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IN THE

Supreme Court of the United States

October Term, 1966.

No. 811

STATE LOAN & FINANCE CORPORATION,
Petitioner,

v.

THE AMERICAN PLAN CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

HOWARD L. WILLIAMS,
ROBERT M. HIGH,
701 Bank of Delaware Building,
Wilmington, Delaware,
Attorneys for Petitioner.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-3711 Area Code 215

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on September 7, 1966.

OPINIONS BELOW.

The oral opinion rendered from the bench in the District Court and the order entered thereon is unreported and is printed in Appendix A hereto, *infra,* pp. 21-29. The opinion and judgment of the Circuit Court of Appeals, printed in Appendix B hereto, *infra,* p. 30, is reported in 365 F. 2d 635.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on September 7, 1966, vacating the judgment of the District Court. On September 22, 1966 a Petition for Rehearing was filed; rehearing was denied on October 4, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. WHETHER THE THIRD CIRCUIT BY ITS OPINION AND ORDER HAS ERRED BY MAKING FINAL DETERMINATIONS WITH RESPECT TO EVERY LEGAL AND FACTUAL ELEMENT OF THE CASE WITHOUT ACCORDING THE PETITIONER ITS RIGHT TO PRESENT ITS CASE.

2. WHETHER THE THIRD CIRCUIT ERRED IN DISREGARDING FINDINGS OF FACT MADE BY THE DISTRICT COURT AND IN THE APPLICATION OF DELAWARE LAW ON UNFAIR COMPETITION.

3. WHETHER THE THIRD CIRCUIT ERRED IN SANCTIONING A PROPRIETARY MONOPOLIZATION OF RESPONDENT'S CORPORATE NAME.

STATEMENT.

This is an unfair competition action in which respondent (hereinafter referred to as "plaintiff") alleges that the petitioner (hereinafter referred to as "defendant") has wrongfully caused certain of its subsidiaries to operate under corporate names utilizing the words "American Plan Corporation". Plaintiff seeks to permanently enjoin the defendant from the use of such words in the conduct of its business and in the corporate names of its subsidiaries.

The District Court, after hearing, entered a preliminary injunction on February 9, 1965 (4a), pursuant to a written Opinion filed on September 22, 1964.[1]

Final hearing on the merits was commenced on September 20, 1965. At the conclusion of plaintiff's case at trial, and prior to defendant opening its case and introducing any of its evidence, defendant moved to dismiss pursuant to F. R. C. P. 41(b) on the grounds that the plaintiff had not established any right to relief. Defendant's motion was granted pursuant to the Court's decision rendered from the bench on September 21, 1965 (8a-14a). The Court, in applying Delaware law, based its decision upon the following findings of fact:

(1) Plaintiff's corporate name is comprised of words descriptive and geographical;

(2) Plaintiff's corporate name has not acquired a secondary meaning;

(3) There has been no worthwhile evidence of confusion or likelihood of confusion because of the use of the name by defendant's subsidiaries.

On October 4, 1965, the Court entered an Order dismissing the action and dissolving the temporary injunction previously granted against defendant on February 9, 1965 (15a-17a). On October 14, 1965, plaintiff moved for a new

1. Citations are to the "Appellant's Appendix" used in the Third Circuit (using "a" designation) and "Appellee's Appendix" (using "b" designation), Certified copies of which are filed with this Petition.

trial pursuant to F. R. C. P. 59(a). This motion was denied December 6, 1965 (7a).

On February 25, 1966 plaintiff was granted leave to docket its appeal in the United States Court of Appeals for the Third Circuit. The opinion and judgment of the Third Circuit was rendered September 7, 1966, reversing the District Court and reinstating the preliminary injunction. The result reached by the Third Circuit was based on three grounds:

(1) The corporate name of plaintiff, American Plan Corporation, is comprised of arbitrary or fanciful words, and the first or prior user of the name is entitled to the exclusive use thereof; and

(2) Proof of secondary meaning is unnecessary; and

(3) Where corporate names are identical or where, as is the instant case, the shortened or popular name of defendant's subsidiaries are identical to the name of plaintiff, the names themselves are evidence of likelihood of confusion.

Defendant filed a Petition for Rehearing on September 22, 1966 which was subsequently denied on October 4, 1966.

Plaintiff was incorporated in 1947 in the State of New York and is qualified as a foreign corporation in the Commonwealth of Virginia. Plaintiff pays corporate taxes in the Commonwealth of Virginia and the State of New York. In other states, where plaintiff allegedly operates, plaintiff pay non-resident license fees. Plaintiff is not called upon to pay taxes other than to New York and Virginia because the insurance company for whom plaintiff acts pays the corporate taxes in those other foreign states (21b).

Plaintiff does not solicit the general public, but is in effect, a branch of the insurance company.

Plaintiff owns eighty-eight and one-half percent (88½%) of the common stock of American Fidelity Fire

Insurance Company (hereinafter referred to as "American Fidelity") (51b, 52b). Under the terms of a certain Agreement entered into between plaintiff and American Fidelity (70b-77b), plaintiff is compelled, with two possible exceptions, to place its physical damage insurance business with American Fidelity. The first such exception involves the manual-rated business. The second exception relates to right of first refusal by American Fidelity (52b). Eighty percent (80%) to eighty-five percent (85%) of plaintiff's total business is written in American Fidelity Fire Insurance Company (51b). As stated earlier, the agency relationship involving plaintiff is the relationship between the insurance carrier and plaintiff. There is no agency relationship between plaintiff and the financial institutions with which it deals.

Eighty-five percent (85%) of plaintiff's business represents the automobile insurance business (51b). The approximate aggregate number of plaintiff's customers in the automobile insurance aspect of its business is 200 (58b). The remaining fifteen percent (15%) of plaintiff's business is divided between the mobile home business and the appliance financing business (51b). In the appliance phase of plaintiff's business, plaintiff has "two or three" customers (54b).

Plaintiff employs a symbol or mark bearing the words "The American Plan" (33b). The mark is used in connection with plaintiff's advertising and business cards. Defendant employs a servicemark registered under the Lanham Act depicting a coin and a globe with a banner through the middle; written upon the banner are the words "American Finance System" (85b; 87a).

Plaintiff does not solicit the general public (30b). Defendant's entire business involves a direct solicitation of the general public (36b).

Plaintiff's sales force, from 1947 to 1952, was comprised of one person; from 1952 to 1962, two persons solicited the business of plaintiff; at the present time, the

sales force is comprised of three persons, plus the Chairman of the Board (56b-57b). The bulk of plaintiff's advertising and solicitation efforts are directed toward attendance at conventions where its customers or potential customers can be met and acquainted with plaintiff's services. In 1958, out of plaintiff's total advertising budget of $3,360.57, plaintiff expended $2,988.07 for attendance and displays at conventions (6b); in 1960, out of a total advertising budget of $19,365.63, plaintiff spent $2,531.08 for attendance and displays at conventions (7b); in 1961, out of a total advertising budget of $7,623.31, plaintiff expended $912.14 on conventions (7b); in 1962, out of a total advertising budget of $1,481.79, plaintiff spent $819.07 on convention expenses (8b).

As far as plaintiff's physical solicitation of business, plaintiff solicits "a small segment of the states" (42b). New business coming to plaintiff is derived to a great extent from efforts asserted through personal contact by plaintiff's personnel at the conventions they attend.

The incidents of confusion introduced by plaintiff at trial were so few as to be actually negligible. A check made payable to and endorsed by one of defendant's subsidiaries was mistakenly deposited into the wrong account by personnel of the Empire Trust Company in New York (38a-39a). The bank itself admitted its mistake and apologized to plaintiff's treasurer for having caused the confusion (88b; 62b). Another incident of alleged confusion involved a person attending the hospitality suite of plaintiff at a convention held in the Midwest, under the mistaken belief that the hospitality suite was operated by defendant. However, plaintiff's Chairman of the Board admitted at trial that it was unknown whether or not this particular guest was or was not a prospective client of plaintiff (50b). The Trial Court held that plaintiff had not shown confusion or likelihood of confusion with respect to the corporate names involved.

The District Court, the Third Circuit and the parties themselves have agreed that in the absence of proof that the law is different in the states where the alleged torts occurred, Delaware law is applicable. The appropriate Delaware law was argued at the time of defendant's motion under F. R. C. P. 41(b), at the time of plaintiff's motion for a new trial in the District Court and on appeal to the Third Circuit. The findings of fact and the conclusions of law made by the United States District Court for the District of Delaware were based upon that court's interpretation of the applicable Delaware law. The District Court, after hearing plaintiff's evidence on the merits, concluded that plaintiff's corporate name was geographical and descriptive within the meaning of *Standard Oilshares, Inc. v. Standard Oil Group,* 17 Del. Ch. 113, 150 A. 174 (1930), and *Shaver, et al v. Heller & Merz Co.,* 108 F. 821, 65 L. R. A. 878. The District Court held that plaintiff had failed to prove that its corporate name had acquired a secondary meaning in the mind of the public, and further, that no confusion or likelihood of confusion existed with respect to the two corporate names under consideration.

The Third Circuit, however, reversed the District Court and drew contrary conclusions with respect to each of the three basic elements in an unfair competition case. The Third Circuit held that the combination of words "american" and "plan", the combination of words which has represented a mode of hotel meals and accommodations for many years and which has been used singularly in literally countless other combinations in the field of finance, were arbitrary and fanciful, and as such, entitled the first user to the exclusive use thereof. The Third Circuit further held that proof of secondary meaning for plaintiff's corporate name is unnecessary, for the apparent reason that the exclusive right to the use of plaintiff's corporate name has no geographical limitation whatsoever. With respect to the third element of alleged unfair competition, i.e. confusion or likelihood of confusion, the Circuit Court

held that the identity of names is, in and of itself, evidence of likelihood of confusion. This determination is made without regard to the nature of the business, to the segment of the public with which the parties deal, or indeed, the scope of geographical use of the name.

REASONS FOR GRANTING THE WRIT.

1. The instant case is an unfair competition dispute arising out of alleged similarity between the corporate names of the parties. There are three fundamental questions which must be determined:

(a) Nature of respondent's corporate name, i.e., whether such name is geographical and descriptive or whether such name is arbitrary and fanciful;

(b) Whether such corporate name has acquired a secondary meaning in the mind of the public with whom it comes in contact, and the geographical scope of use;

(c) Whether there is confusion or likelihood of confusion between the corporate name of respondent and the shortened or popular names of certain subsidiaries of the petitioner.

At trial in the District Court, at the conclusion of respondent's case and before the petitioner opened or introduced one witness on its behalf, the petitioner moved under F. R. C. P. 41(b) to dismiss respondent's case for failure to prove unfair competition within the framework of applicable Delaware law. The District Court, in response to petitioner's motion, made certain specific findings of fact and rulings of law, all within the framework of Delaware law, which both parties had agreed was the controlling law. These findings of fact and conclusions of law were contained in that Court's opinion rendered from the bench on September 21, 1965 (Appendix A). The trial court ruled that (a) the words comprising the respondent's corporate name were geographical and descriptive and as such, were not capable of being legally protected absent the acquisition of secondary meaning; and (b) the respondent's corporate name had not acquired any secondary meaning in the mind of the public with whom it comes in contact; and (c) no confusion or likelihood of confusion existed in the mind

of the public with respect to the two corporate names before the Court.

On appeal to the Third Circuit, that Court re-examined the lower court's rulings and findings of fact and reversed the lower court on the following grounds:

(a) Without reference to the finding of fact made by the lower court with respect to the nature of the respondent's corporate name, i.e., that the lower court had indeed found that respondent's corporate name was comprised of geographical and descriptive terms, the Third Circuit held that respondent's corporate name was comprised of arbitrary and fanciful terms which entitled respondent to the exclusive use of such name; and

(b) Since respondent is entitled to the exclusive use of its corporate name, there is no burden on respondent to prove that its corporate name has acquired any secondary meaning in the mind of the public or any burden to prove the geographical scope of its use; and

(c) Since the name of respondent is identical to the shortened or popular names of petitioner's subsidiaries, the names in themselves are evidence of likelihood of confusion. The effect of the Third Circuit's opinion is to render a summary judgment in favor of the respondent without the benefit of any evidence which the petitioner was and is in the position to offer. This evidence of the petitioner not only relates to the merits of the case but also concerns the very jurisdiction of the District Court. The evidence of the petitioner may include the proof of law of the other jurisdictions wherein the alleged torts occurred, to show that such law differs from that of Delaware.

The respondent has put on its case. The trial court has ruled that the respondent did not carry the burden of proving an actionable cause. The Appellate Court, however, has reversed these determinations and by its judgment has, for all practical considerations, closed the court-

room door to the petitioner. The Third Circuit has made its findings and rulings based upon respondent's case and these findings effectively preclude the petitioner from proceeding to present its case.

2. The Circuit Court, in its opinion of reversal disregarded the express finding of fact made by the District Court that respondent's corporate name is comprised of geographical and descriptive words in common use as opposed to coined or fanciful terms. This finding is implicit in the following portion of Judge Steel's oral opinion of September 21, 1965 (Appendix A, p. 25):

> "In referring to a secondary meaning of a trade-mark which is entirely analogous, *where it is not a coined word which is being used but a descriptive word*, this Circuit has said, in Barton against Rex-Oil, 2 Fed. 2d 402 at 405, 'The test of secondary meaning is whether the trade-mark has become broadly known to the public as denoting a product of certain origin. Therefore, in looking for a secondary meaning this Court is controlled by the fact—' and the Court italicizes the word 'fact'—'that such a meaning has been acquired in the mind of the public . . .'"

The above determination by Judge Steel that respondent's name is descriptive and not a coined word, was made in the context of *Barton v. Rex-Oil Co.*, 2 F. 2d 402 (3rd Cir. 1928), a leading case of the Third Circuit, where the Court dwelt at length on the legal distinctions between coined and descriptive corporate names. This finding of fact by the lower court should not have been overruled unless found to be clearly erroneous. *O'Brien v. Westinghouse Electric Corp.*, 293 F. 2d 1 (C. A. 3, 1961) and the 1963 amendments to Rule 41(b).

The Third Circuit, in its opinion dated September 7, 1966, assumed that the above initial determination had not been made. The Opinion of the Court states (Appendix B, p. 34):

> "Thus, the question of whether proof of secondary meaning is necessary resolves itself into the determination of whether the name 'American Plan Corporation' is geographical or descriptive or fanciful or arbitrary."

The District Court, in its role as trier of the facts, had already answered the foregoing question in its factual determination that Respondent's name was *not* coined, fanciful or arbitrary. This determination as to the nature of the corporate name involved was a prerequisite to the subsequent consideration of secondary meaning and confusion.

The determination of fact made by Judge Steel was exclusively within his province as trier of fact. Appellations such as "fanciful", "coined", "geographic" have no intrinsic meaning, but are merely conclusions based upon facts. This is clearly pronounced in *American Automobile Insurance Co. v. American Auto Club*, 184 F. 2d 407 (9th Cir. 1950) where the Court stated:

> "A greater degree of protection is afforded to fanciful trade-names than to names in common use, and where a generic word is widely used in the designation of many diverse businesses, its use by one may not be prohibited at the behest of another, even in closely related fields, unless such use will indicate a common origin or endanger the business reputation of the other. * * * The words 'American' and 'Auto' are used in identification of many businesses of diverse nature. The Court found that these words are not unique either individually or in combination. The evidence disclosed several instances wherein the combination 'American' and 'Auto' has been used in the identification of automobile clubs. As such it is a common name in that field."

The evidence in the record clearly reflects that the words "American" and "plan" are also used in the identification of many businesses of diverse nature, e.g., Morris

Plan, Commercial Credit Plan, and the term "American" used in literally countless enterprises.

The Respondent did not coin the title "American Plan", but merely appropriated to itself a term which is and has been in use for many years to denote a mode or method of payment for hotel accommodations and meals. Respondent has allegedly used this name and sought to attach to it, by usage, a meaning in its business of insurance identifiable with Respondent.

The trial court made its finding of fact as to the nature of the Respondent's corporate name. This determination should not have been ignored or set aside.

The Delaware case of *American Radio Stores, Inc. v. American Radio & Television Stores Corp.*, 17 Del. Ch. 127, 150 Atl. 180 (1930) did not, as the Third Circuit assumed in its opinion, have the effect of holding that "* * * an exclusive right may be established in a name which is a combination of the words 'American' and the goods in which plaintiff deals."

In the *American Radio* case the Court found that the defendant was using its name in direct competition with the complainant in the same territories where the complainant operated, and that there was actual confusion in the mind of the public. The Court held that the words "radio" and "stores" were purely descriptive, but when the word "American" was used in conjunction with them, a distinguishing mark was introduced. For this specific holding the Chancellor cited *Shaver, et al. v. Heller & Merz Co.*, (C. C. A.), 108 F. 821, 65 L. R. A. 878, wherein the Court held that the word "American" was a geographical term, but when used in conjunction with other descriptive words comprising plaintiff's business and product had acquired a secondary meaning in the mind of the purchasing public and consequently was capable of being legally protected.

The *Shaver* case was interpreted by a Delaware court at great length in the case of *Standard Oilshares, Inc. v. Standard Oil Group*, 17 Del. Ch. 113, 150 A. 174 (1930), wherein the Chancellor stated:

> "* * * In that case the word 'American' notwithstanding its geographical character generally exempted it from appropriation by any one, was, *by reason of a secondary meaning which the complainant's business had attributed to it when associated with 'ball blue' and 'wash blue,'* held to be a distinguishing part of the complainant's trademark and as such entitled to be protected from use by the defendant."

In the *American Radio Stores* case it can, therefore, be determined that the Chancellor found as a matter of fact that the complainant's use of the word "American" had also acquired a secondary meaning when used in conjunction with the descriptive words comprising complainant's corporate title. The Delaware courts have clearly characterized the word "American" as geographic, and protection is only afforded corporate names utilizing that term where it is found that the name in question has acquired a secondary meaning.

The Third Circuit misapplied the *American Radio Stores* case. This Delaware case supports the Petitioner's position and was so interpreted by the District Court.

The Third Circuit in its opinion of September 7, 1966 concluded that the lower court should have applied a less strict standard for determining likelihood of confusion in the case where the names are identical. That Court further determined that no Delaware cases had decided this issue.

The Circuit Court overlooked two Delaware decisions which specifically relate to the question of likelihood of confusion in instances where the corporate names are identical or close to identical. In *Federal Glass Co. v. Federal Glass Co.*, 104 F. Supp. 692 (D. C. Del., 1952), the corporate names before the Court were identical. After Judge Leahy heard reargument on defendant's renewed motion for summary judgment, he modified his views on the case and applied what he considered the controlling Delaware law. In his former opinion Judge Leahy had applied the law of

unfair competition as it had been developed and discussed in the Federal cases. In his modified opinion after reargument, he felt compelled to apply what he considered the applicable Delaware law on unfair competition. He stated that "this being so, the case of United States Plywood Co., Inc. v. United Plywood Corp., 19 Del. Ch. 27, 161 A. 913, 914, is applicable to the case at bar".

Judge Steel in making his finding of fact regarding the confusion or lack of confusion present in the case before this court used the same tests and standards as set forth in the *United States Plywood* case, and, in fact, relied heavily on this important Delaware decision as embodying the current law on the subject of unfair competition in the State of Delaware.

The corporate names before the Delaware Chancellor in the *United Plywood* case, *supra*, were "United States Plywood Co." and "United Plywood Corp." In discussing the potential confusion involved, the Chancellor stated:

> "* * * The complainant has thirty thousand customers, or prospective customers, to whom it sends its catalogues at least every six weeks. It has twenty-five salesmen traveling on visits to the trade. It has I believe made diligent search for instances of confusion of its name with the defendant's and vice versa. It has produced evidence of certain facts which it claims show that the alleged confusion does exist. The evidence is before me, but I shall not burden this opinion with a discussion of its details. It is sufficient for me to say that when it is sifted and appraised, it fails completely to convince me that any confusion worth noticing exists. That two stenographers who took dictation of letters from their employers who knew perfectly well the two different companies, when instructed to address the letters to the 'flooring company,' mistook the proper addresses, is of no moment. As was said by this court in Drugs Consolidated v.

> Drug Incorporated, supra, 'courts have refused to pay too meticulous a regard to the possible confusion that might be occasioned by similarity of names in the minds of ignorant or careless people.' This remark is of greater or less significance according as the class of persons before whose eyes the names are particularly intended to be displayed and to whom the identification indicated thereby is especially designed to be made, are of more or less intelligence. In the instant case, currency of these names is not among the masses of the undiscriminating public. They circulate among builders, architects, supply houses and direct consumers of a selected type—informed classes who can be expected to exercise a degree of intelligence and discrimination quite above the average."

The decision of the Third Circuit is not in line with the Delaware law. That Court cites no evidence which supports its reversal of the District Court finding of fact regarding the lack of confusion present in the instant case.

3. It is submitted that the Circuit Court erred in extending respondent's rights in the use of the term "American Plan" in its insurance business to preclude the use of the term by all other persons or corporations regardless of the nature of their business, and regardless of where, and with whom, and how it is conducted. Such proprietary monopolization is especially unwarranted where, as here, the words "american" and "plan" are, by themselves, merely geographic and suggestive, have been used, in combination, for decades by the public in reference to hotel accommodations, and have been employed singly, countless times in diverse combinations of names both in the finance and other business.

The harsh doctrine of "first user in one market—first user in every market" has been properly subordinated to the more relevant consideration of unfair competition. A leading case has construed the Lanham Act to prohibit the

use of such doctrine in trademark cases and to require the application of the law of unfair competition. In *S. C. Johnson & Son v. Johnson*, 175 F. 2d 176 (2nd Cir. 1949), *cert. den.* 338 U. S. 860 (1949), the Court held that Johnson, a wax company, could not preclude Johnson, a cleaning fluid company, from labeling its products as "Johnson Cleaner". The Court refused to construe the Lanham Act to protect absolutely the use of a trademark by one as against all others "because to do so would frequently result in great hardship to others, and give the first user of a mark a wholly unjustified power to preëmpt new markets" (at p. 179). It then discussed the interest of the first user in preserving its reputation and its possible extension of business into that market which the second user had begun to exploit:

> "* * * These are legitimate interests and they are properly weighed against the second user's interests; but it is far from true that the mere fact of confusion between the two users should always and of itself tip the scales in favor of the first. In (citations omitted) we tried to show how the power of a first user to establish such a premonitory lien upon a future market might lead to great injustice. * * * The case at bar is an admirable example of how unfairly a literal enforcement of the language of the new act may operate. The plaintiff does not sell cleaning fluid; it makes waxes and other polishes, and the defendants cannot possibly turn away from it any customers who would buy these instead of cleaning fluids. * * * True, nobody likes to have his reputation subject to the hazards of another's conduct; but there is no suggestion that in fact the defendants have tarnished the plaintiff's name in the minds of those who may think they are buying its goods. Again, although the plaintiff may at some future time wish to make cleaning fluids, it does not now even intimate such a purpose. *We cannot conceive any justification in these circumstances for allowing it to reach*

> *a choking hand into a market not its own, and to deprive the defendants of an interest, natural and proper in its origin, and after sixteen years presumably an important element in their business.* If Congress really meant to allow every first user of a mark so to stifle all excursions into adjacent markets upon showing no more than that confusion would result, it seems to us that it would have said so more clearly." (Emphasis supplied.)

In this case, petitioner and respondent are not competitors; one is "a branch of [an] insurance company," dealing with business executives; the other makes small loans to the general public. The effect of the Circuit Court's decision is to remove from inquiry all factors bearing on unfair competition and to presume that petitioner has no legitimate interest in, or right to the use of, the name "American Plan" in its business, admittedly non-competitive to that of respondent. Thus, petitioner is proscribed from showing that respondent has sustained no damage, no loss of sales, no loss of profit, no loss of prestige, no injury to its goodwill, nor that its name or reputation was tarnished in any way.

The Circuit Court, in determining that the federal law of unfair competition did not differ materially from that of Delaware, and in applying early federal precedents to the case at bar, failed to recognize the trend of the federal courts to inquire into the equities present in each case to determine each case on its peculiar facts, and to grant relief upon principles of common business integrity. See *General Motors Corporation v. Cadillac Marine & Boat Company,* 226 F. 2d 716 (D. C. W. D. Mich. 1964).

The rule is well stated in *Federal Telephone & Radio Corp. v. Federal Television Corp.,* 180 F. 2d 250 (2d Cir. 1950), a case involving the sale of related equipment (television sets by defendant, radios and telephone equipment by plaintiff) under the name "Federal". In holding for defendant, the court set forth the controlling principles:

"* * * Although there appears to be a persistent belief that the first use of a specific name or description gives a power to the first user to prevent its use by others, it is important to remember that no such doctrine exists. In all such cases there is only one question: What damage to the first user will the second do by the use of the first user's mark, or name or make-up, and what burden will it impose upon the second user effectively to distinguish the goods?"

These tests have clearly not been applied by the Third Circuit. There has been no balancing of equities, no inquiry into scope of use. The concept of "first user—exclusive user" simply does not represent the law of Delaware, or indeed, the federal law. From an equitable standpoint, and more importantly, from an economic viewpoint, such a "harsh and unreasonable doctrine" would not be consonant with orderly and progressive economic growth.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD L. WILLIAMS,
ROBERT M. HIGH,
701 Bank of Delaware Building,
Wilmington, Delaware,
Attorneys for Petitioner.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 2727

THE AMERICAN PLAN CORPORATION,
a corporation of the State of New York,
Plaintiff,

v.

STATE LOAN & FINANCE CORPORATION,
a corporation of the State of Delaware,
Defendant.

ORAL OPINION.

The Court: As I understand it, the defendant has filed a motion under Rule 41(b) to dismiss the action upon the grounds that under the facts and the law the plaintiff has established no right to relief. In my judgment that motion should be granted.

The rule requires that I find the facts which support my judgment. I could, of course, wait until requests are filed, briefs are filed, do this and do it a lot more articulately, perhaps, and with better style than I can do it now, but I think I can state upon the record the reasons for my decision so that the parties will understand them and that any reviewing court will understand them.

This is an unfair competition action in which the plaintiff, The American Plan Corporation, seeks to permanently enjoin the defendant from using the words "American

Plan'' in any way in the conduct of its business, including the use of such words in the corporate names of its subsidiaries.

The action was begun on August 19, 1963. Plaintiff was organized under the laws of New York State and has its principal place of business in New York State. Defendant is incorporated in the State of Delaware and has its principal place of business in the District of Columbia. The amount in controversy exceeds $10,000, exclusive of interest and costs. This Court has jurisdiction of the action.

The plaintiff was incorporated in 1947. It adopted the name ''The American Plan Corporation'' in 1948. Its business is primarily performing a service for institutions in the consumer credit business. These are primarily lending institutions. The plaintiff, through its personnel and in conjunction with independent insurance agents, endeavors principally to develop for banks and finance companies and other concerns engaged in large volume retail financing operations insurance programs tailored to meet their particular needs. When a program is worked out, insurance is placed through an agent and plaintiff acts on behalf of the insurance carrier to perform all of the functions which it would normally perform except the management of its investment portfolio.

The plaintiff does not solicit the insuring public but confines its solicitation operations to financial institutions with a view to consummating agreements between those institutions or their agents and the insurance companies which the plaintiff represents.

Eighty-five per cent of plaintiff's business relates to automobile insurance, that is to say, when lending institutions acquire conditional sales contracts as security for loans which they make, illustratively to an automobile dealer, the insurance in many instances is placed through the medium of the plaintiff on the automobiles, which essentially are the collateral which the lending institutions have. And fifteen per cent, approximately, of the plaintiff's business is insuring mobile homes and appliances.

The plaintiff has roughly two hundred accounts which it services. Among them are such institutions as the Marine Midland Bank of Buffalo, Fruehauf Trailer, Morris Plan Bank of San Francisco, Commercial Credit Corporation of Baltimore, and the Associated Finance Company of South Bend and Chrysler of Detroit.

The plaintiff solicits business in all of the states of the United States except possibly four and during its business has performed services for institutions in virtually all states of the United States. It advertises in financial journals which have nationwide distribution using the name "American Plan Corporation", solicits business by mail, which carries that heading, has representatives who attend conventions and have hospitality suites for the purpose of entertaining prospective customers and actual customers, displaying, certainly in many instances, its name "American Plan Corporation". Frequently the business of the plaintiff is obtained through the recommendations of others.

The defendant is a holding company. It does business through subsidiaries and in most instances owns all of the stock of the subsidiaries. The subsidiaries are engaged primarily in the small loan business, not the insurance business.

On November 30 of 1963 subsidiaries of the defendant had 553 loan offices located in thirty states and in Canada. These offices made loans primarily to wage earners and people earning moderate salaries when they needed cash for unforeseen circumstances.

In 1958 for the first time one of the defendant's subsidiaries adopted the name "American Plan" as part of its name. It was not until December of '62 that subsidiaries of the defendant first began to use the name "American Plan" widely, frequently being followed by a geographic location indication, such as "American Plan of Philadelphia". Subsidiaries of the defendant are now using the name in the states of Alabama, Arkansas, Georgia, Indiana, Louisiana, Mississippi, Ohio, Oklahoma, Pennsylvania, Tennessee and Texas.

Now, as I have stated, the plaintiff is essentially in the insurance business and solicits lending institutions. The defendant is essentially in the small loan business and solicits its business from the public that need moneys or want to borrow funds. Nevertheless, although these two companies are not competitive, it is the claim of the plaintiff that the use of the name "American Plan Corporation" by subsidiaries of the defendant constitutes unfair competition. Plaintiff argues that the financial institutions, the business of which it solicits, operates in the same field as does defendant's subsidiaries and that the use by defendant's subsidiaries of the name "American Plan" in their corporate names either has caused or will cause in the future confusion, prejudicial to the plaintiff. This is on the theory that plaintiff's potential and actual customers will be led to believe that defendant's subsidiaries are in some way connected with the plaintiff and are in competition with plaintiff's customers.

Now, I think it is for the most part questionable whether in substantial part the plaintiff's customers are actually in competition with the defendant's subsidiaries, but if it be assumed, I shall consider the case on the postulate that they are in some part in competition.

Now, what is the law in a case of this kind? What is the law to be applied? The common law. There is no federal law involved in this case. This is a case where the jurisdiction is based on diversity of citizenship. Here we have a claim by the plaintiff that there is nationwide unfair competition by the defendant.

Under Klaxon v. Stentor, reported in 313 U. S. 487, this Federal District Court must apply the conflicts of laws rule which a State of Delaware Court would apply. Under the Delaware Conflicts of Laws Rule, in the case of a tort the substantive rights of the parties are governed by the law of the jurisdiction where the wrong occurs. In this case that would be the wrongful use, if it was a wrongful use, of the name by the defendant subsidiaries of "American Plan Corporation".

This latter principle is settled by Black and Yates against Mahogany Association, 129 Fed. 2d 227, at 233, decided by the Third Circuit in 1942. In so deciding the Third Circuit relied upon the Delaware decision of Skillman against Conner, reported in 193 Atlantic 563.

Now, where a tort has occurred outside of Delaware, if there is no showing that the law of the state where the tort occurred is different from the law of Delaware, Delaware law will be applied, E. I. du Pont de Nemours & Co. against Du Pont Safety Razor Corp., 82 Atlantic 2d 384, followed in this District by Judge Leahy in 1952 in Federal Glass Co. against Federal Glass Co., 104 Fed. Supp. 692.

A case of importance in this jurisdiction is Standard Oilshares against Standard Oil Group, Inc., reported in 150 Atlantic 174 and decided by the Court in Chancery in 1930. There the Chancellor said:

> "Names that are descriptive of articles, things or occupations, names that are purely geographical, are names that are the common property of all men, and the law will not recognize the right in any individual, except under unusual circumstances, to appropriate unto himself to the exclusion of everyone else the use of such names in his business."

Then further:

> "The unsual circumstance that works an exception to this general rule consists in the fact that by public acquiescence the complainant has so appropriated the common name or descriptive term as to give it a secondary meaning identifiable with the complainant."

In referring to a secondary meaning of a trademark, which is entirely analogous, where it is not a coined word which is being used but a descriptive word, this Circuit has said, in Barton against Rex-Oil, 2 Fed. 2d 402 at 405, "The test of secondary meaning is whether the trade-mark has

become broadly known to the public as denoting a product of certain origin. Therefore, in looking for a secondary meaning this Court is controlled by the fact—" and the Court italicizes the word "fact"—"that such a meaning has been acquired in the mind of the public . . ."

Now, here, in this case, in order for "American Plan Corporation" to have acquired a secondary meaning, it must be established that actual or potential customers of the company, plaintiff company, have come to believe that that name means the plaintiff, or at least service rendered by the plaintiff in a particular way which the plaintiff has been rendering. There is no evidence before me to support such a view. So that in this instance at least the name is in the public domain so far as this defendant is concerned.

Now, there is another aspect of the case which was argued on the motion which has appeal to me, and that is that there has been no worthwhile evidence of confusion or likelihood of confusion because of the use of the name by the defendant's subsidiaries. U. S. Plywood against United Plywood Corporation, 161 Atlantic 913 is cited, and it seems to me that it is broadly analogous. There the Court pointed out that courts have refused to pay too meticulous a regard to the possible confusion that might be occasioned by similarity of names in the minds of ignorant or careless persons, and that in the case before it the currency of the names is not among the masses of the undiscriminating public.

Now, that is true in this case. The use of the plaintiff's name is not before the masses of the undiscriminating public. It is before real top-grade, sophisticated, intelligent bankers, executives of lending institutions, and the fact that there may have been the evidence of confusion or mistake by some bookkeeping department or by some woman who borrowed a little money from one of the defendant subsidiaries means nothing in the posture of this case.

The only evidence of any kind of confusion or likelihood of confusion is the testimony by Mr. Pace that Mr.

Perkins, who was President of Home Town Finance Company of Clinton, at a convention indicated that he thought that possibly the plaintiff was in the small loan business because it had the name "American Plan" as did subsidiaries of the defendant. It seems to me if this is the only evidence of confusion, in itself it rings the death knell of the case.

As I have said, I could have put on paper, had I had requests for findings and the record typed, the reasons for my decision in a more articulate way than I have, but I think that from what I have said the parties can understand why I am dismissing the case and any reviewing court can understand it. It is primarily for two reasons: There has been no secondary meaning proved and there has been no confusion established.

So the motion will be granted, and if an order is prepared, it will be signed.

ORDER AND JUDGMENT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE.

Civil Action No. 2727.

THE AMERICAN PLAN CORPORATION,
A CORPORATION OF THE STATE OF NEW YORK,
Plaintiff,

v.

STATE LOAN & FINANCE CORPORATION,
A CORPORATION OF THE STATE OF DELAWARE,
Defendant.

ORDER.

AND NOW TO-WIT, this 4th day of October, 1965, it appearing as follows:

(1) That upon issue being joined, plaintiff moved this Court for a temporary injunction to enjoin defendant from forming subsidiary corporations using the name "American Plan" or altering the name of any of defendant's subsidiaries in any fashion employing the name "American Plan", and

(2) That on February 9, 1965, this Court granted plaintiff's motion for temporary injunction, and

(3) That Insurance Company of North America, a Pennsylvania corporation, as surety executed and caused to be filed in these proceedings its bond in the amount of $25,000.00 as security for the payment of such costs and damages which might be incurred and suffered by any party wrongfully enjoined or restrained, and

(4) That the above-captioned cause came on for hearing before this Court commencing September 20, 1965, and

(5) That upon the termination of the proof of plaintiff's case, defendant did move this Court to dismiss the action pursuant to Rule 41(b), and the Court thereafter heard argument by counsel for both parties on defendant's said motion, and

(6) That this Court did render its opinion from the bench on September 21, 1965 on defendant's motion to dismiss (herein incorporated by reference).

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that

(1) The above action is hereby dismissed with prejudice costs to be paid by plaintiff;

(2) The temporary injunction against defendant granted by this Court dated February 9, 1965 is hereby dissolved and vacated;

(3) Insurance Company of North America as corporate surety is hereby relieved from any and all obligation under said bond.

STEEL,
Judge.

Approved as to form:

.....

C. WAGGAMAN BERL, JR.,
BERL, POTTER & ANDERSON,
Delaware Trust Building,
Wilmington, Delaware,
Attorney for Plaintiff.

H. L. WILLIAMS,
HOWARD L. WILLIAMS,
MORRIS, JAMES, HITCHENS & WILLIAMS,
701 Bank of Delaware Building,
Wilmington, Delaware,
Attorney for Defendant.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15797

THE AMERICAN PLAN CORPORATION,
Appellant,

v.

STATE-LOAN & FINANCE CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Argued May 19, 1966
Before STALEY, *Chief Judge,* and MCLAUGHLIN and SMITH, *Circuit Judges.*

OPINION OF THE COURT.

(Filed September 7, 1966)

By STALEY, *Chief Judge.*

This appeal requires us to decide whether, under the law of Delaware, the appellant's corporate name is of such a character as to prevent the appellee's subsidiaries from adopting corporate names identical or similar to it.

The appellant, American Plan Corporation, is a service organization, it provides insurance coverage on chattels which are being purchased on installment contracts. Though appellant is not itself an insurance company, it places insurance for the benefit of the holders of commercial paper through a number of different carriers. The

characteristic which appears to make appellant unique is that it offers to banks, lending institutions, and other holders of commercial paper a comprehensive plan of insurance to guaranty the security value of the chattels which are being financed through the particular institution.

Appellant incorporated in 1947 and adopted its present name in 1948. Although it services only about two hundred institutions, the American Plan Corporation has solicited or conducted business in virtually every state. It advertises in trade journals and solicits business by mail. Much of its business comes to it on the recommendation of others.

The appellee, State Loan & Finance Corporation, is a parent corporation which conducts its business through more than five hundred subsidiaries in thirty different states. These subsidiaries are engaged primarily in the small loan business. Beginning in 1958 and becoming more prevalent in the 1960's, these subsidiaries began to use the words "American Plan Corporation" as corporate names or as part of their corporate names.[1] There are presently more than 140 of these subsidiaries employing the words "American Plan Corporation" in their titles, the most common being the American Plan Corporation of a particular city.[2]

The appellant commenced this action in the district court. It seeks to permanently enjoin[3] the appellee from the use of "American Plan Corporation" in the conduct of its business and in the corporate names of its subsidiaries.

---

1. As an example of the wholesale adoption of the words "American Plan Corporation" by appellee's subsidiaries, it was disclosed in the answers to interrogatories that twenty-seven subsidaries were organized under or changed their names to "American Plan Corporation" of some geographical designation after this suit was filed. This was the basis for the district court's issuance of a preliminary injunction.

2. Several exhibits offered by the plaintiff at trial indicate that the geographical designation appearing after the words "American Plan Corporation" was deleted in various advertisements.

3. The complaint also states a claim for damages; however, that claim appears to have been abandoned.

The case proceeded to trial; and after the plaintiff had concluded its proof, the defendant moved under Rule 41(b) to dismiss the case on the grounds that plaintiff had established no right to relief. The court granted defendant's motion and in an oral opinion stated that plaintiff had failed to prove that its name had acquired a "secondary meaning" and that there had been no showing of likelihood of confusion, both of which were essential to its case. This appeal followed.

Jurisdiction exists in this case by virtue of diversity of citizenship. The conflicts rules to be applied are those of the forum state, Delaware. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U. S. 487 (1941). The parties agree that in the absence of proof that the law is different in the states where the torts occurred, Delaware courts will apply Delaware law. See Federal Glass Co. v. Federal Glass Co., Inc., 104 F. Supp. 692, 693-94 (D. Del., 1952), citing E. I. duPont de Nemours & Co. v. DuPont Safety Razor Corp., 32 Del. Ch. 156, 82 A. 2d 384 (1951).

We note at the outset that there has been a considerable difference of opinion between the parties as to whether Delaware law is similar to the general law of unfair competition and, in particular, the common law of trade-name infringement. Our examination of the cases cited by the parties and our own independent research have failed to reveal any significant dissimilarity between the Delaware cases and the general law as formulated by the state and federal courts. The Delaware courts have themselves been cognizant of a limited body of Delaware law in this area, E. I. duPont de Nemours & Co. v. DuPont Safety Razor Corp., 32 Del. Ch. at —, 82 A. 2d at 386, and have shown no hesitancy to look to the law of other jurisdictions. *Cf.* Coca-Cola Co. v. Nehi Corp., 27 Del. Ch. 318, 36 A. 2d 156 (1944). The District Court of Delaware, which has decided many cases in this area, has remarked that "a canvass of the Delaware decisions reveals that the local courts apply the universal principles governing the law of unfair com-

petition," Taussig v. Wellington Fund, Inc., 187 F. Supp. 179, 193 (1960), and we have agreed, *aff'd*, 313 F. 2d 472, 474 at n. 2 (1962), *cert. denied*, 374 U. S. 806 (1963).

The primary issue before us is whether the district court was correct in holding that Delaware law required the plaintiff to prove that its name had acquired a "secondary meaning." We conclude that it erred. We read the Delaware cases as holding that a plaintiff in a trade-name infringement—unfair competition case must show (1) either that its name is capable of exclusive appropriation or that its name, though not capable of exclusive appropriation, has acquired a "secondary meaning" *and* (2) that the name appropriated by the defendant is of such similarity to that of plaintiff that plaintiff's customers or potential customers are likely to confuse the two, United States Plywood Co., Inc. v. United Plywood Corp., 19 Del. Ch. 27, 161 Atl. 913 (1932); American Radio Stores, Inc. v. American Radio & Television Stores Corp., 17 Del. Ch. 127, 150 Atl. 180 (1930); Standard Oilshares, Inc. v. Standard Oil Group, Inc., 17 Del. Ch. 113, 150 Atl. 174 (1930); Delaware Charter Co. v. Delaware Charter Service Co., 16 Del. Ch. 246, 144 Atl. 659 (1929); Drugs Consolidated, Inc. v. Drug, Inc., 16 Del. Ch. 240, 144 Atl. 656 (1929).

For public policy reasons, words which are purely descriptive or purely geographical have been held to be non-exclusive.[4] Absent a showing of secondary meaning, no action for unfair competition may be maintained. American Radio Stores, supra; Standard Oilshares, supra;

4. In the Standard Oilshares case, the Delaware court stated:

"* * * Names that are descriptive of articles, things or occupations, names that are purely geographical are names that are the common property of all men, and the law will not recognize the right in any individual, except under unusual circumstances, to appropriate [them] unto himself * * *. The unusual circumstance that works an exception to this general rule consists in the fact that by public acquiescence the complainant has so appropriated the common name or descriptive term as to give it a secondary meaning identifiable with the complainant." 17 Del. Ch. at —, 150 Atl. at 177.

see also annots., 66 A. L. R. 948, 957-58 (1930), and 115 A. L. R. 1241, 1244 (1938). Where, however, the words are arbitrary or fanciful and could be descriptive of anything, they are not descriptive at all, and the prior user is entitled to the exclusive use thereof. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, 257 (1916). Stated another way: "Rights in names of corporations which are made up of fanciful non-descriptive names are based on priority of use and as between two similar corporate names, not personal or descriptive in character, the one coming into existence last must give way to the prior one." 1 Nims, Unfair Competition and Trade-Marks § 92 at 279 (4th ed.).

Thus, the question of whether proof of secondary meaning is necessary resolves itself into the determination of whether the name "American Plan Corporation" is geographical or descriptive or fanciful or arbitrary. The specific issue before us has already been decided by the Delaware courts. In American Radio Stores, Inc. v. American Radio & Television Stores Corp., supra, the Court of Chancery stated:

> "* * * [T]he words 'radio' and 'stores' * * * are purely descriptive and, when used by the complainant, have attached to them no meaning of a secondary nature. But when the word 'American' is used in conjunction with them, a distinguishing mark is introduced and the complainant is enfitled to be protected in its use of that distinctive feature of its name." 17 Del. Ch. at —, 150 Atl. at 183.

Similar results in the use of the term "American" were reached in Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., supra ("American Girl" shoes), and Dennison Mfg. Co. v. Thomas Mfg. Co., 94 Fed. 651, 653 (D. Del., 1899) ("American Express" sealing wax). With regard to our earlier statement that Delaware follows the general law,

it should be noted that the American Radio case goes even further than the general law in holding that an exclusive right may be established in a name which is a combination of the words "American" and the goods in which plaintiff deals. Compare Shaver v. Heller & Merz Co., 108 Fed. 821 (C. C. A. 8, 1901). With these precedents before us, we are compelled to conclude that appellant has an exclusive right to the use of the words "American Plan Corporation" and that proof of secondary meaning is unnecessary. Compare American Products Co. v. American Products Co., 42 F. 2d 488 (E. D. Mich., 1930).

The second and equally vital question is whether plaintiff presented sufficient evidence of likelihood of confusion in order to prevail. The district court found that it had not; and since this case was decided on a motion for judgment under Rule 41(b), the facts as found must be accepted unless "clearly erroneous." See O'Brien v. Westinghouse Electric Corp., 293 F. 2d 1 (C. A. 3, 1961), and the 1963 amendments to Rule 41(b). Where the question raised, however, is whether the district court applied the correct legal standard in evaluating the evidence, the "clearly erroneous rule" has no application.

Appellant maintains that the district court improperly applied the legal yardstick of cases where the names were merely similar, when it should have applied a different standard; it contends that a less strict standard for determining likelihood of confusion should obtain in cases where the names are identical. No Delaware cases have decided this issue, nor have any Federal courts applying Delaware law decided it.[5] Considering all the cases which we have heretofore discussed, we conclude that the Delaware courts,

5. Neither Federal Glass Co. v. Federal Glass Co., Inc., 104 F. Supp. 692 (D. Del., 1952), nor Fox Fur Co. v. Fur Co., 59 F. Supp. 701 (D. Del., 1945), are relevant. The result in the Federal Glass case was dependent on defendant's offer to change its name, and the Fox Fur case turned on the misleading use of a descriptive name.

if confronted with the issue before us, would not require a similar standard of proof.

Where the names are identical or where, as here, the shortened or popular names of appellee's subsidiaries are identical to that of the complaining party, the names in themselves are evidence of likelihood of confusion. See American Steel Foundries v. Robertson, 269 U. S. 372, 381 (1926). The reasons for this conclusion are simple. The United Plywood and Drugs Consolidated cases state that little regard should be had for mistaken similarity in the minds of ignorant or careless people. A necessary corollary to this rule is that where a person must be unusually intelligent or cautious in seeking out the identity of a corporation which cannot be ascertaained from its name, there is indeed likelihood of confusion. Coupling this determination with the evidence adduced by appellant in the district court, it is clear that it has satisfied its burden of proving likelihood of confusion.

We must dispose of one further matter which was impliedly raised before the district court and before us. The parties in this case are not competitors; their businesses, however, are closely related. Plaintiff's principal complaint is that competitors of the defendant are potential purchasers of plaintiff's services and that because of the identity or similarity of names between the two, potential customers may avoid dealing with the plaintiff on the grounds that they might be aiding a competitor. This complaint is remediable in an action for trade-name infringement and unfair competition. In applying Delaware law on a previous occasion, we noted that there is a right to make one's own reputation and good will. Taussig v. Wellington Fund, Inc., 313 F. 2d at 478; see also E. I. duPont de Nemours & Co. v. DuPont Safety Razor Corp., 32 Del. Ch. —, 82 A. 2d 384; Ambassador East, Inc. v. Orsatti, Inc., 257 F. 2d 79, 82 (C. A. 3, 1958), quoting from Yale Electric Corp. v. Robertson, 26 F. 2d 972, 974 (C. A. 2, 1928).

The judgment of the district court will be vacated, its preliminary injunction of February 9, 1965, will be reinstated, and the cause remanded [6] for disposition not inconsistent with this opinion.

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6. See United States v. United States Gypsum Co., 340 U. S. 76, 85 (1950).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15797

THE AMERICAN PLAN CORPORATION, A CORPORATION OF THE STATE OF NEW YORK,
Appellant

v.

STATE LOAN AND FINANCE CORPORATION,
A CORPORATION OF THE STATE OF DELAWARE
(D. C. CIVIL No. 2727)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Present: STALEY, *Chief Judge,* and MCLAUGHLIN and SMITH, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed October 5, 1965, be, and the same is hereby vacated, the preliminary injunction of February 9, 1965 is reinstated, and the cause is remanded for disposition not inconsistent with the opinion of this Court. Costs taxed in favor of appellant.

ATTEST:

M. ELIZABETH FERGUSON,
Deputy Clerk.

September 7, 1966

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IN THE

Supreme Court of the United States

October Term, 1966

No. 811

STATE LOAN AND FINANCE CORPORATION,

Petitioner,

v.

THE AMERICAN PLAN CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

LEO H. HIRSCH, JR.,
Counsel for Respondent,
No. 25 Broad Street,
New York, N. Y. 10004.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 811

STATE LOAN AND FINANCE CORPORATION,

Petitioner,

v.

THE AMERICAN PLAN CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

Opinions Below

The opinion of the Court of Appeals (36-37p*) is reported in 365 F. 2d 635. The oral opinion of the District Court (21-27p) is unreported.

* References to the Petition for Certiorari herein are numerals followed by "p"; references to Appellant's Appendix in the Court of Appeals are numerals followed by "a"; references to Appellee's Appendix in the Court of Appeals are numerals followed by "b".

Jurisdiction

The judgment of the Court of Appeals (38p) was dated and entered September 7, 1966. An order denying a petition for rehearing was dated and entered October 4, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. Whether the District Court acted properly in granting petitioner's motion pursuant to FRCP 41(b) at the close of respondent's case to dismiss this action for failure to establish a right to relief.
2. Whether the name "American Plan Corporation" is (a) geographic or descriptive, so as not to be entitled to protection without proof of secondary meaning, or (b) fanciful or arbitrary, so as to be entitled to protection without such proof.
3. Whether, if such proof of secondary meaning is required, respondent offered sufficient evidence thereof.
4. Whether, where names are identical, less proof of likelihood of confusion is required than where the names are merely similar.
5. Whether respondent offered sufficient evidence of likelihood of confusion in view of the identity of names.
6. Whether respondent is entitled to relief where 145 of petitioner's subsidiaries bear respondent's name and are in competition with respondent's customers.

Statement

Petitioner's statement (3-8p) omits one of the most important facts in this case: petitioner's subsidiaries are in the same business as respondent's principal customers and potential customers, to wit: lending to the consuming public. Both courts below so found. District Judge Steel said:

> "Its [respondent's] business is primarily performing a service for institutions in the consumer credit business. These are primarily lending institutions • • • (22p).
>
> "The plaintiff [respondent] does not solicit the insuring public but confines its solicitation operations to financial institutions • • • (22p).
>
> "The defendant [petitioner] • • • does business through subsidiaries • • •. The subsidiaries are engaged primarily in the small loan business • • •" (23p).

Chief Judge Staley, writing for a unanimous Court of Appeals, said:

> "The characteristic which appears to make appellant [respondent] unique is that it offers to banks, lending institutions, and other holders of commercial paper a comprehensive plan of insurance • • •.
>
> "These [petitioner's] subsidiaries are engaged primarily in the small loan business (30-31p).
>
> "The parties in this case are not competitors; their businesses, however, are closely related. Plaintiff's [respondent's] principal complaint is that competitors of the defendants [petitioner] are potential purchasers of plaintiff's services and that because

> of the identity or similarity of names between the two, potential customers may avoid dealing with the plaintiff on the grounds that they might be aiding a competitor. This complaint is remediable * * *'' (36p).

Another important fact omitted from the petition is the relative unimportance of the name in suit to petitioner as contrasted with its great importance to respondent. Petitioner uses the name for some 145 subsidiaries (66-71a) out of 553 offices (23p). (Each office is a separate corporation [51a]). The name ''American Plan'' is not petitioner's first choice of the name of a corporate subsidiary; its first choice has always been ''American Finance'' (58a). It has no second choice; it uses ''American Loan,'' ''American Acceptance,'' ''American Budget'' or ''American Plan,'' wherever ''American Finance'' is not available (57-58a). It first used ''American Plan'' in 1958 in Mississippi only (56a). Except for one office in Louisiana, the name was not used again until 1962 (64-65a). (This action was commenced in 1963 [22p]). A change of name causes petitioner no increase in advertising expenses; its only cost would be for new stationery and signs (63-64a).

In sharp contrast, respondent has been known exclusively as ''The American Plan Corporation'' since 1948 (22p). Under that name it has built up a substantial business. In each of the last three years its net written premiums were between $22,000,000 and $32,000,000 (28-29a). The value to respondent of its name is demonstrated by the fact that the bulk of its business comes to it with-

out solicitation (28a, 31a) on recommendation of others (23p). Respondent's name has become very well known in the field it serves, lending institutions (28a). Respondent has advertised its name throughout the United States by direct mail, in financial publications and by maintenance of hospitality suites at conventions (23p). (Under these circumstances, it is of no significance that its "physical solicitation" of business is now limited to a few states [6p]; it formerly solicited in 48 states [31a].)

Petitioner's statement that respondent's Chairman of the Board admitted that "it was unknown" whether one of the individuals confused by the similarity of names was a prospective customer (6p) is misleading. The Chairman, Mr. Hart, testified that *he* believed the individual might be a potential customer, but did not know it for a fact (49-50b). This is of no significance, since Mr. Hart did not participate in the incident (47b). Mr. Pace, respondent's Vice President, was present and testified fully about the incident (45-47a, 69b). He stated flatly that the individual was a prospective customer (47a) and, on cross-examination, gave the reasons for such statement (69b). It is thus clear that respondent, through its Vice President, did in fact know the individual was a potential client.

Petitioner's statement fails to comply with Rule 23(1)(g) of the Rules of this Court requiring information as to the basis for federal jurisdiction in the court of first instance. Such basis herein is diversity of citizenship, 28 U. S. C. §1332(a). District Judge Steel stated that respondent is a New York corporation, that petitioner is a

Delaware corporation with its principal place of business in the District of Columbia, and that the amount in controversy exceeds $10,000 exclusive of interest and costs (22p).

Argument

Respondent respectfully submits (a) that this is not the type of case where certiorari should be granted and (b) that the decision of the Court of Appeals was correct.

(A) Certiorari Is Not Warranted

Nowhere in the petition is any effort made to show why this case is one where there are "special and important" reasons for granting certiorari within the meaning of Rule 19 of the Rules of this Court. Essentially, this is merely an action for unfair competition in the use of trade names, in which the District Court held that the facts presented by respondent were insufficient to establish its right to relief, and in which the Court of Appeals held the contrary and remanded the case for further proceedings (37p).

In *Magnum Import Company* v. *Coty*, 262 U. S. 159, 163 (1923), Chief Justice Taft said:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdic-

> tion was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing."

More recently, it has been stated that "this Court does not sit * * * for the benefit of the particular litigants." *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 74 (1955), and that a writ of certiorari will be dismissed as improvidently granted when there is nothing in the case except the determination of ultimate facts "and their review would be of no importance save to the litigants themselves," *Rudolph* v. *United States*, 370 U. S. 269, 270 (1962), reh. den. 371 U. S. 854 (1962).

Respondent respectfully submits that the foregoing opinions precisely cover the instant case. No showing is made that there is an important question which the public interest requires this Court to review. Since this is a case in which federal jurisdiction exists solely because of diversity, a conflict among circuits would not be a reason for granting certiorari. *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 202, 206 (1938). Petitioner concedes that each case of unfair competition must be determined "on its peculiar facts" (18p). There is thus no more in this case than the application of common law rules of law to specific facts, "of no importance save to the litigants themselves."

Petitioner argues that the decision of the Court of Appeals is not "consonant with orderly and progressive economic growth" (19p). There is no showing herein that petitioner's growth will be thwarted if it is prevented from using respondent's name for its subsidiaries, par-

ticularly where such name is not petitioner's first choice and has been used by only a minority of petitioner's subsidiaries.

Just this term, this Court refused certiorari in a case where a man has been restricted in the use of his own name, *Findlay* v. *David B. Findlay, Inc.*, 385 U. S. —, (No. 479, Nov. 7, 1966). The instant case involves nothing of remotely comparable importance or public interest.

Furthermore, it has been repeatedly held that this Court will normally accept the determinations of Courts of Appeals on questions of state law.

Richards v. *United States*, 369 U. S. 1, 16, ftn. 35 (1962);

General Box Co. v. *United States*, 351 U. S. 159, 165 (1956);

Ragan v. *Merchants Transfer & Warehouse Company, Inc.*, 337 U. S. 530, 534 (1949);

Spiegel's Estate v. *Commissioner*, 335 U. S. 701, 707-708 (1949);

Huddleston v. *Dwyer*, 322 U. S. 232, 237 (1944).

Both courts below and both parties agree that this diversity case is governed by the Delaware conflicts rules and that under such rules, in the absence of any showing of any contrary law in the jurisdictions where the acts of unfair competition took place (and there was no such showing herein), the law of Delaware governs (7p, 24-25p, 32p). The Court of Appeals fully considered Delaware law (32-36p). There is no reason why, under the foregoing authorities, this Court should not accept the

determination of the Court of Appeals as to Delaware law.

Accepting such determination, there is nothing to review.

Finally, it should be noted that the judgment appealed from is not a final one, but remands the case to the District Court for further proceedings. This fact, in itself, is a sufficient ground for denial of certiorari.

Hamilton-Brown Shoe Company v. *Wolf Brothers & Company*, 240 U. S. 251, 258 (1916).

For all these reasons, it is respectfully submitted that, even if the decision of the Court of Appeals were wrong, which respondent denies, certiorari should not be granted.

(B) The Decision of the Court of Appeals Was Correct

Petitioner does not question the rule that when a trade name is arbitrary or fanciful, it is entitled to protection without proof of secondary meaning, *Telechron, Inc.* v. *Telicon Corp.*, 97 F. Supp. 131, 151 (D. Del., 1951) affd. 198 F. 2d 903 (C. A. 3, 1952). Similarly, respondent does not question the rule that proof of secondary meaning is essential when a name is geographic or descriptive, *Standard Oilshares, Inc.* v. *Standard Oil Group, Inc.*, 17 Del. Ch. 113, 150 A. 174 (1930). Accordingly, the first question is whether "American Plan Corporation" is (a) fanciful or arbitrary, or (b) descriptive or geographic.

In deciding this question of law and determining that the name in suit is fanciful or arbitrary, the Court of

Appeals relied on *American Radio Stores v. American Radio & Television Stores Corp.*, 17 Del. Ch. 127, 150 Atl. 180 (1930),* holding that "American Radio Stores" was entitled to protection without proof of secondary meaning; *Hamilton-Brown Shoe Company v. Wolf Brothers & Company, supra,* holding "American Girl," as applied to shoes, an arbitrary name; and *Dennison Manufacturing Co. v. Thomas Manufacturing Co.*, 94 Fed. 651 (D. Del., 1899), reaching a similar result as to "American Express" when applied to sealing wax (34p).

The Court of Appeals properly applied Federal as well as Delaware precedents, since Delaware generally follows the Federal law of unfair competition. *Taussig v. Wellington Fund, Inc.*, 313 F. 2d 472, 474, ftn. 2, (C. A. 3, 1963) cert. den. 374 U. S. 806 (1963).

In *Hamilton-Brown Shoe Company v. Wolf Brothers & Company, supra,* Mr. Justice Pitney, writing for this Court, stated at pages 256-257 of 240 U. S.:

> "We do not regard the words 'The American Girl,' adopted and employed by complainant in connection with shoes of its manufacture, as being a geographical or descriptive term. It does not signify that the shoes are manufactured in America, or intended to be sold or used in America, nor does it indicate the quality or characteristics of the shoes. Indeed, it does not, in the primary signification, indicate shoes at all. It is a fanciful designation, arbitrarily selected by complainant's predecessors to designate

* There is no basis for the statement in the petition that this case was interpreted by the District Court as supporting petitioner's position (14p). The District Court never referred to this case.

> shoes of their manufacture. We are convinced that it was subject to appropriation for that purpose, and it abundantly appears to have been appropriated and used by complainant and those under whom it claims."

This is precisely applicable to the instant case. "American Plan" does not describe respondent's insurance service or indicate that respondent is in the insurance business. Clearly, it is a fanciful and arbitrary designation and the Court of Appeals was correct in so holding.

Even if "American Plan" were not arbitrary, the Court of Appeals would have been right in vacating the judgment dismissing the complaint at the close of respondent's case. Testimony had been received that respondent's name was very well known in the field in which it sought customers, financial institutions (28a). This testimony had not been contradicted. Such testimony satisfied the requirement of showing secondary meaning as that phrase is defined in *Barton* v. *Rex-Oil Co.*, 2 F. 2d 402, 405 (C. A. 3, 1928), and in *G. & C. Merriam Co.* v. *Saalfield*, 198 Fed. 369, 373 (C. A. 6, 1912). Accordingly, if secondary meaning were required, it had been established.

The Court of Appeals held that the identity of names is itself evidence of likelihood of confusion (36p). This is implicit in this Court's statement in *American Steel Foundries* v. *Robertson*, 269 U. S. 372, 381 (1926), that equitable relief is available both where names are identical and where "the resemblance is so close as to be likely to produce confusion." See, aso, *Telechron, Inc.* v. *Telicon Corp., supra*, 97 F. Supp. at 146.

Petitioner claims that the Court of Appeals "overlooked" two Delaware decisions on this question (14p). The first of these, *Federal Glass Co.* v. *Federal Glass Co.*, 104 F. Supp. 692 (D. Del., 1952), was considered by the Court of Appeals and found irrelevant (35p, ftn. 5). The other, *United States Plywood Co., Inc.* v. *United Plywood Corp.*, 19 Del. Ch. 27, 161 A 913 (1932), does not involve identical names, and was used by the Court of Appeals in reaching the conclusion that identity of names shows likelihood of confusion (36p).

In this connection, it should be noted that the Court of Appeals did not hold that the identity of names alone sufficed to warrant an injunction. It held that a less strict standard of proof is required when names are identical (35-36p) and that coupling the identity with the evidence of confusion produced in the District Court, respondent had "satisfied its burden of proving likelihood of confusion" (36p). There is thus presented, not a mere issue of law, but a question of whether specific evidence of confusion* satisfied respondent's burden of proving likelihood of confusion. Respondent submits that the Court of Appeals properly held that the burden had been satisfied, but in any event, this Court does "not grant a certiorari to review evidence and discuss specific facts," *United States* v. *Johnston*, 268 U. S. 220, 227 (1925).

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* A potential customer of respondent thought respondent was in the finance business, as petitioner's subsidiaries are (45-47a); respondent's bank account was credited with items belonging to one of petitioner's subsidiaries (38-39a); erroneous advice was given respondent that its bank account was overdrawn (40a) and advice was given to respondent by a borrower from one of petitioner's subsidiaries that the latter was "ruining your image" (78-81a).

Petitioner asserts that the Court of Appeals "erred in extending respondent's rights in the use of the term 'American Plan' in its insurance business to preclude the use of the term by all persons or corporations regardless of the nature of their business * * *" (16p). Respondent respectfully submits that the Court of Appeals made no such determination. The Court of Appeals did not deal with respondent's rights against anyone except petitioner. It could not decide and did not decide whether someone in a field wholly unrelated to the businesses of respondent and of its customers could use the name "American Plan." It recognized that the businesses of the parties "are closely related" (36p). It noted respondent's complaint that petitioner's competitors are respondent's potential customers and that the identity of names may cause such potential customers to refuse to deal with respondent for fear of aiding a competitor. It concluded that such a complaint was remediable (*id*).

In reaching this conclusion, the Court of Appeals relied on three cases, *E. I. DuPont De Nemours & Co.* v. *DuPont Safety Razor Corp.*, 32 Del. Ch. 156, 161, 82 A 2d 384 (1951), where it was said that a plaintiff is entitled to protection against danger to its reputation even though it was not in competition with defendant, *Taussig* v. *Wellington Fund, Inc., supra,* and *Ambassador East, Inc.* v. *Orsatti,* 257 F. 2d 79 (C. A. 3, 1958).* In each of the last

* *Taussig* v. *Wellington Fund, Inc.* was decided in 1963. These cases disprove petitioner's claim that the Court of Appeals applied "early federal precedents to the case at bar" (18p).

two cases, the Third Circuit had quoted (313 F. 2d at 478; 257 F. 2d at 82) with approval the famous words of Judge Learned Hand in *Yale Electric Corporation* v. *Robertson*, 26 F. 2d 972, 974 (C. A. 2, 1928), to the effect that an appropriation of one's name and reputation

> "is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask. And so it has come to be recognized that, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two, it is unlawful."

Petitioner respectfully submits that the Court of Appeals properly applied this doctrine to the instant case. Petitioner's business is clearly not so foreign to respondent's "as to insure against identification of the two." Respondent seeks business at finance conventions (26a) and in finance publications (25a). The record shows that at least one person thought respondent was in the finance business (46a); a witness, who specialized in obtaining insurance for banking institutions (33a), referred to an example of an insurance company wholly-owned by a finance company (35a) and testified that he had ceased doing business with such company because of such affiliation (*id.*) and would consider taking the same step as regards petitioner if he learned that *it* had become similarly affiliated (36a), because of a desire not to give ideas to a competitor and not to strengthen a competitor (36-37a). Most important of all, respondent's customers, like

petitioner's subsidiaries, are engaged in lending to the consuming public (22p, 23p, 30-31p) and are thus competitors. The natural desire not to help a competitor may well prevent lending institutions from giving business to respondent under the belief, induced by the identity of names, that respondent is affiliated with petitioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

LEO H. HIRSCH, JR.
Counsel for Respondent.